

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB NOV. 22, 99

Paper No. 14  
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U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Ty, Inc.  
v.  
Polymeric, Inc.

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Opposition No. 105,760  
to application Serial No. 75/107,840  
filed on May 21, 1996

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Julie A. Katz of Welsh & Katz, Ltd. for Ty, Inc.

Edward F. Perlman of Wolf, Greenfield & Sacks, P.C. for  
Polymeric, Inc.

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Before Simms, Walters and Chapman, Administrative Trademark  
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Polymeric, Inc. has filed an intent-to-use application  
to register the mark TEENIE BEANIES for "dolls and doll  
clothing."

Ty, Inc. has opposed the application, alleging (in nine  
numbered paragraphs) that since November 1993 it has  
continuously marketed and sold plush animal toys under the  
marks BEANIE BABIES and THE BEANIE BABIES COLLECTION; that  
these products have been advertised and promoted extensively

by retailers and authorized dealers; that in spring 1996 opposer and McDonald's Corporation began discussions regarding a joint promotion, resulting in an agreement dated November 1996 whereby McDonald's Corporation was permitted to have miniaturized toy versions of ten of opposer's BEANIE BABIES designs manufactured for inclusion with McDonald's meals; that the two companies would promote these ten plush toys under the mark TEENIE BEANIE BABIES, with the promotion scheduled to begin in April, May, June 1997; that the mark TEENIE BEANIE BABIES would belong to opposer, and the use thereof would inure to opposer's benefit; and that applicant's mark, if used on its goods, would so resemble opposer's previously used marks for plush animal toys and miniaturized versions of plush toys, as to be likely to cause confusion, mistake or deception.

Applicant admitted that it filed the involved application and that it has made no use of the mark, but otherwise denied the allegations of the notice of opposition.

The record before this Board consists only of the pleadings,<sup>1</sup> and the file of the involved application.<sup>2</sup>

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<sup>1</sup> Statements made in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. See *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991); and *Times Mirror Magazines, Inc. v. Sutcliff*, 205 USPQ 656 (TTAB 1979). See also, TBMP §706.01.

<sup>2</sup> See Trademark Rule 2.122(b).

Neither opposer nor applicant submitted any testimony or offered any other evidence.

Only opposer filed a brief.<sup>3</sup> An oral hearing was not requested by either party.

Opposer bears the burden of proof in this case, and must establish its claim by a preponderance of the evidence. See *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989). Inasmuch as opposer submitted no evidence or testimony at all, opposer's claim must fail for lack of proof.

Opposer's argument in its brief (p. 2) that there is no issue as to priority is incorrect. Opposer must either establish priority through testimony, or submit proper status and title copies of its registrations<sup>4</sup> pursuant to Trademark Rule 2.122(d)<sup>5</sup> so that the issue of priority does not arise. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Opposer argues in its brief (p. 3), unsupported by citation to any statute, rule, judicial case or any other

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<sup>3</sup> Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. See *BL Cars Ltd. v. Puma Industria de Veiculos S/A*, 221 USPQ 1018 (TTAB 1983); and *Abbott Laboratories v. TAC Industries, Inc.*, 217 USPQ 819 (TTAB 1981). See also, TBMP §706.02.

<sup>4</sup> Opposer did not plead ownership of any registrations.

<sup>5</sup> Opposer attached photocopies of two registrations to its brief on the case (for the marks BEANIE BABIES and THE BEANIE BABIES COLLECTION, both for plush toys). These copies are (1) untimely and (2) not status and title copies prepared by this Office.

authority, that applicant's answers to opposer's first six paragraphs of the notice of opposition should be deemed admissions because opposer's allegations are not denied and applicant did not state that it was without knowledge or information sufficient to form a belief as to the truth of each allegation. Applicant's answers to the six involved paragraphs read as follows: "The Applicant is not fully informed of the allegations of Paragraph \_\_ (1-6), and, therefore, leave the Opposer to prove the same."

Pleadings are to be construed so as to do substantial justice; and there are no technical forms for pleading. See Fed. R. Civ. P. 8(b), (e) and (f).

Rather, a pleading formulation which approximates the text of Fed. R. Civ. P. 8(b) will be effective as a denial so long as it is comprehensible and the pleader's intent can be readily understood. See 5 Wright & Miller, Federal Practice and Procedure: Civil 2d §§ 1261 and 1262 (2nd ed. 1990). Under the aforementioned standard, applicant denied the involved allegations, and clearly and specifically left opposer to its proof.

Finally, opposer argues (p. 3) that applicant did not respond to the requests for admission which opposer served on applicant<sup>6</sup>, thus rendering the requests deemed admitted

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<sup>6</sup> Opposer refers to its requests for admission Nos. 1-5 in the body of its brief (p. 7), and it refers to its requests for admission Nos. 6-10 in the conclusion of its brief (p. 11).

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pursuant to Fed. R. Civ. P. 36(a). However, opposer did not submit a timely notice of reliance on the involved requests for admission, and therefore, they are not of record. See Trademark Rule 2.120(j)(3)(i). (Each of the cases cited by opposer involved situations where evidence was properly made of record in the case.)

Inasmuch as this record includes no testimony or any other evidence, opposer's specific arguments regarding the issue of likelihood of confusion are to no avail.

Decision: The opposition is dismissed.

R. L. Simms

C. E. Walters

B. A. Chapman  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board